

back became injured as a direct result of his ankle injury. Claimant further contends there was an underpayment of temporary total disability compensation.

Conversely, respondent disagrees that claimant suffered permanent impairment to his back. Respondent requests that the Board affirm the ALJ's Award for a 14 percent scheduled injury to the claimant's left lower extremity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law in some detail. It is not necessary to repeat those findings and conclusions herein. The Board finds the ALJ's Award to be accurate and adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

To summarize, claimant was injured on October 8, 2000, while in the course of his employment as a warehouse order filler for respondent. On that date claimant was gathering merchandise to fill a customer's order when the contents of a wooden pallet fell and landed on his left lower leg. Claimant was immediately taken to a local hospital emergency room for treatment. There was swelling but no fracture was found. Claimant was diagnosed with a severe left ankle sprain. He was released with crutches and instructed to avoid bearing weight on the left leg.

Claimant was given conservative followup treatment at an occupational medicine facility. He was later referred to orthopedic surgeon Fred A. Rice, Jr., M.D., on November 7, 2000. At that time claimant was prescribed medication, physical therapy and exercise. He was given light duty restrictions of sedentary work only with no standing or walking more than one hour at a time. Dr. Rice concurred with the initial diagnosis of severe left ankle sprain.

On November 21, 2000, Dr. Rice noted dramatic improvement in claimant's leg and ankle. Claimant was walking without any limp. He was released to full duty with no further followup. However, claimant was seen again by Dr. Rice on January 16, 2001, and it was noted that claimant had some swelling and walked with a trace of a limp. Claimant reported he had returned to work in November, but the prolonged standing and walking caused him to experience pain and swelling. He was prescribed a brace and anti-inflammatory medications. At that time claimant was given light duty restrictions with no prolonged standing or walking greater than one-hour at a time.

Claimant was last seen by Dr. Rice on January 30, 2001, at which time Dr. Rice concluded he had reached maximum medical improvement and based on the *Guides*

provided a rating of 14 percent to the ankle, which is 10 percent to the lower extremity and four percent to the body as a whole.¹ Claimant was given restrictions. Dr. Rice indicated that the ankle would be a permanent problem and claimant would need to alter the way he performed his work or complete job retraining. Claimant was released from medical treatment with no scheduled follow-up. Over the course of treatment provided by Dr. Rice, the claimant did not indicate any complaints with regard to his back.

On March 22, 2001, claimant was seen by orthopedic surgeon Daniel M. Downs, M.D., at the request of his attorney. Dr. Downs noted in his report that claimant had no evidence of associated knee or hip problems in his lower extremities. Dr. Downs also noted in his report that his impression was claimant had a severely sprained left ankle and recommended further evaluation including an MRI of the ankle to look at articular surfaces. Dr. Downs recommended a second opinion, a more extensive evaluation and more aggressive treatment. He concluded claimant's ankle injury was going to continue to be a limiting problem and may require further treatment in the future. At that time there were no restrictions imposed by Dr. Downs. There was no mention of back complaints.

Thereafter, claimant was examined by John R. Eplee, M.D., on April 30, 2002, to rule out the possibility of a blood clot, which he did.

Ultimately, claimant was examined by orthopedic surgeon Greg Horton, M.D., on August 2, 2001. Dr. Horton determined that claimant's ankle should be arthroscopically cleansed and the lateral ligaments tightened. He performed that surgery on October 31, 2001. Thereafter, claimant received physical therapy for a three or four month period. Claimant was released on June 13, 2002, with permanent restrictions and a 15 percent permanent functional impairment rating to the left lower extremity. Dr. Horton released claimant to return to work April 1, 2002, with instructions to use his ankle brace. Although claimant testified that he had on going back pain and a significant limp throughout his period of treatment, the only mention of back complaints in Dr. Horton's records appears on June 20, 2002. It states:

I have reviewed my office chart. Quite honestly, I do not find where I have made note of any problems with his back in my office chart. I do not make treatment of spine problems as [sic] part of my practice. It is my usual practice that if someone complains to me to the extent that their back requires intervention, then I will refer him on to someone else. I do not have any independent recollection of whether Mr. Boldridge discussed a back problem with me or not. I have asked him about this today. He tells me that this bothers him intermittently. This was worse when he was on his crutches. It seems as though it has improved. He tells me that it

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (5th ed.).

bothers him on occasion. When he does substantial lifting or climbing, this will bother him more.²

Claimant was examined twice by P. Brent Koprivica, M.D., at the request of claimant's attorney for the purpose of diagnosis, rating and restrictions. Dr. Koprivica first saw claimant on April 10, 2001, and then again on April 30, 2002 for an independent medical examination. Utilizing the 4th edition of the *Guides*, Dr. Koprivica rated claimant's left leg impairment at 29 percent and, in addition, assessed a five percent impairment to the body as a whole for claimant's low back condition. These ratings combine to 16 percent to the body as a whole.³ It is worth noting that claimant's initial back complaints were in his upper back between his shoulder blades.⁴ However, Dr. Koprivica described claimant's back impairment as in the low back. He believed that claimant's ambulation with an altered gait caused the low back symptoms. Dr. Koprivica reported:

As a direct and natural consequence to the permanent injury to the left foot and ankle and the noted altered gait, Mr. Boldridge has developed mechanical low back pain as well. In my opinion, his chronic back pain is a permanent condition in light of the persistence of the pain despite discontinuation of crutch ambulation, the surgical reconstruction, the debridement that has been performed, and the ongoing use of an AFO.⁵

The ALJ ordered an independent medical examination by Vito Carabetta, M.D., which was performed on August 21, 2002. In his report, Dr. Carabetta noted that claimant had a significant limp, which he attributed to the ankle injury. Utilizing the 4th edition of the *Guides*, Dr. Carabetta rated claimant's left leg injury as a 14 percent impairment of function and assessed an additional five percent permanent partial impairment to the body as a whole for claimant's subjective back complaints.⁶ However, after Dr. Carabetta viewed video tapes taken of claimant he changed his opinion. Because the pronounced limp claimant had demonstrated upon examination was not present during the activities captured on video tape, Dr. Carabetta concluded that he could no longer attribute claimant's back symptoms to the work-related accident. Accordingly, he assessed no permanent impairment rating to the back and limited claimant's impairment to the left lower extremity.

² Horton Depo. Resp. Ex. G at 1.

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

⁴ Koprivica Depo. Ex. 4.

⁵ *Id.* at 27.

⁶ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Accordingly, only Dr. Koprivica, claimant's hired expert, assigned a permanent impairment rating to claimant's back. The other physicians limited their diagnosis and ratings to the left lower extremity only.

Dr. Koprivica was not shown the videotape but, on cross-examination Dr. Koprivica further testified, in part:

Q. (Mr. Greenbaum) You assumed he walks with a limp all the time?

A. (Dr. Koprivica) I assumed that he walked with a limp, yes.

Q. All the time?

A. Yes.

Q. As I understand the basis in your opinion for his low back impairment is the walking with the limp all the time, correct.

A. Yes.

Q. If it was proven that he didn't walk with a limp all the time, then you might have to review the situation because your basis for the opinion would be invalid?

A. If you told me that hypothetically he did not have an altered gait, then I would change my opinion.

Q. Okay. So if I posed the question to you and said if you assumed that he does not walk with a limp all the time and does not have an altered gait, then your opinion regarding permanent partial disability to the low back would change?

A. Yes.⁷

The video tape does not disprove claimant's complaints of back symptoms, but it does disprove that he has a permanent and pronounced limp. As such, it casts doubt upon whether claimant's back symptoms are permanent and rateable under the *Guides*.⁸ Furthermore, as the ALJ pointed out in the Award, intermittent back pain would not justify the five percent impairment under DRE Category II of the *Guides*. Although it is possible to award a work disability where there are permanent restrictions even in the absence of a rateable impairment, the Board finds claimant's restrictions are attributable to his ankle injury and not to any resulting back injury. Accordingly, as claimant's injury and disability

⁷ Koprivica Depo. at 52 and 53.

⁸ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

are contained within the scheduled injury statute, K.S.A. 44-510d, no work disability can be awarded.

The ALJ concluded that claimant's work-related injury was limited to his left lower leg and adopted the 14 percent permanent partial impairment rating of Dr. Carabetta. The Board agrees with this determination and affirms the ALJ's Award. The Board also affirms the ALJ's finding that claimant failed to prove that he is entitled to additional weeks of temporary total disability compensation.

Award

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Julie A. N. Sample dated June 19, 2003, is affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent and Transcontinental Ins. Co.
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

